United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

74-2382

To be argued by
ARTHUR E. McINERNEY

B P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

JAMES M. MORRISSEY, JOSEPH PADILLA, RALPH IBRAHIM, individually and on behalf of the members of the National Maritime Union of America,

Plaintiffs-Appellees-Appellants,

against

JOSEPH CURRAN, SHANNON WALL, WILLIAM PERRY, ABRAHAM E. FREEDMAN, MARTIN SEGAL and LEON KARCHMER,

Defendants-Appellants-Appellees.

ON APPEAL FROM UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFFS-APPELLEES-APPELLANTS

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BRIEF OF PLAINTIFFS-APPELLEES-APPELLANTS

PRELIMINARY STATEMENT

These are appeals and cross-appeals from the order of District Judge Dudley B. Bonsal dated September 11, 1974 and the judgment entered thereon on September 17, 1974 (Appendix II, p. 154-156a). The memorandum decision underlying the said order dated August 26, 1974 (Appendix II, p. 147-153a) is not yet reported.

The order appealed from directed that 39% ($30,155.08) of the fee paid by the Officers' Pension Fund to attorneys representing the defendant Leon Karchmer be restored to the Fund, and that 39% ($31,906.72) of the fee paid by the trustees of the

Officers' Pension Fund to attorneys representing the defendant Martin Segal be restored to the Fund, and that any further fees so paid be divided on the same percentage.

The defendants Karchmer and Segal have appealed from that portion of the order.

The plaintiffs have cross-appealed from the same order insofar as it

1. Failed to direct the restoration of 100% of such fees; and

2. Failed to direct the restoration of all fees paid from the Officers' Pension Fund to attorneys serving the interest of the defendants Curran, Wall and Freedman.

ISSUE PRESENTED ON PLAINTIFFS' APPEAL

1. Should any portion of the fees of attorneys for services performed for several defendants have been paid from union funds under the circumstances existing?

STATEMENT OF FACTS

This action was brought on behalf of the membership of the National Maritime Union of America (NMU) under Title 29

United States Code § 501 (LMRDA Section 501), reading in applicable part:

> "(a) The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization."

The complaint charged that improper payments had been made to the NMU Officers' Pension Fund (OPF) and that improper payments had been made from that Fund to William Perry and others.

The defendants were Mr. Curran and Mr. Wall who had transferred the money from the General Fund of the union to the Officers' Pension Fund, Mr. Karchmer, Mr. Segal and Mr. Freedman who as trustees of the Officers' Pension Fund had made the payments from the Fund, and William Perry.

Judgments were demanded for the restoration by OPF to the General Fund of the money improperly received, surcharging the defendants with the money which had been improperly paid out to William Perry, and against William Perry for the money he had improperly received.

Thus the defendants and particularly the defendants who were trustees of the OPF were in a conflicting position. It was in the interest of the union to recover the money from the OPF but it was in the interest of the defendants to show, if they could, that the money had been properly paid - thereby avoiding a surcharge. It was in the interest of the OPF to recover the money from William Perry but it was in the interest of the defendant trustees to show, if they could, that the money had been properly paid to William Perry - thereby avoiding a surcharge.

Patently, the same attorney could not argue from one corner of the mouth, that the money had been properly paid and that there should be no surcharge: while, at the same time, argue from the other corner that the money had been improperly paid and should be recovered primarily from Perry, who had profited by the misapplication of funds, and secondarily from the trustees who had so misapplied the funds.

This stands out like a "sore thumb" when we observe that the trustees did not retain one attorney to represent the Fund and to protect its interest but each trustee retained his own attorney who came in fighting to show that the money had been properly paid out.

In recognition of this conflict and following the suggestion of this Court on the first appeal, the District Court made an order dated July 6, 1970* reading (Appendix II, p. 230a):

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*The correct date of this order is July 8, 1970, but all papers in the District Court consistently refer to the erroneous date of July 6, 1970 (e.g. see Appendix II, p. 15a, 23a, 24a, 25a, 26a, etc.). To avoid confusion and for the purpose of consistency we continue reference to that date.

> "The defendants are enjoined from employing counsel paid or to be paid with union funds."

Now, of course, the OPF consisted solely of "union funds." If there were ever any doubt of that it was put to rest when on October 26, 1972 the District Court held in this very action (Morrissey v. Curran, 351 F. Supp. 775, aff'd [2d Cir., 1973] 483 F 2d 480) that:

> "For the purpose of section 501(a) the funds paid by NMU to the Officers' Pension Plan and by it to Perry were funds of NMU."

The issues remaining were then brought on to trial, tried and judgments entered:

1. Against the OPF for $674,222.60 for money wrongfully paid to OPF by NMU with interest. This judgment was paid.

2. Against William Perry for $263,307.00 in favor of the OPF for money wrongfully paid to him by the trustees with interest. This judgment has not been paid.

3. Against Abraham E. Freedman in favor of the OPF for $272,740.50 representing moneys wrongfully paid by OPF to William Perry with interest. This judgment has been paid.

The District Court found that, in making the payment, Freedman had acted recklessly and with indifference to his duties as trustee. The Trust instrument provided that the trustees would be liable only for damages occasioned by their wilful misconduct. Freedman's conduct had met this test.

The District Court found that although Karchmer and Segal had been negligent in making the payment to Perry their

misconduct had not been wilful and that accordingly they were protected by the exoneration clause in the instrument.

These judgments were affirmed by this Court (Morrissey v. Curran, 483 F 2d 480) and applications for writs of certiorari denied by the Supreme Court (Freedman v. Morrissey, 414 U.S. 1128; Perry v. Morrissey, 414 U.S. 1128 and Morrissey v. Curran, 414 U.S. 1128).

All the while the plaintiffs assumed that the defendants' attorneys were being paid by the respective defendants personally in conformity with the injunction order of July 6, 1970. However, shortly before the appeals and applications had all been finally determined the plaintiffs discovered these startling facts:

1. The OPF had paid attorneys representing Mr. Segal and Mr. Karchmer sums totaling $167,644.45 for services rendered in this action (Appendix II, p. 110a).

2. The OPF had paid attorneys representing Freedman sums totaling $85,829.11 for services rendered in this action (Appendix II, p. 110a).

3. The OPF had paid attorneys $29,611.49 for services performed in conducting proceedings supplementary to judgment (Appendix II, p. 110a) in a futile effort to collect the judgment against Perry. It should be noted that the collection of the Perry judgment would have exonerated Freedman and the $29,611.49 was spent on his behalf - not on behalf of the trust. The trust had been made whole by its judgment against Freedman.

4. OPF had paid the Willkie firm the sum of $7,059.84 for an opinion apportioning the fees paid to attorneys

representing Freedman between Freedman individually and Freedman as trustee (Appendix II, p. 110a).

5. In sum attorneys representing the defendants had been paid $290,144.89 - from union funds (Appendix II, p. 110a).

6. In addition thereto, when the matter was heard below the attorneys for Messrs. Segal and Karchmer were preparing to bill the OPF for additional fees of in excess of $19,500.00 (Appendix II, p. 110a).

THE PROCEEDINGS BELOW

The plaintiffs moved to impose sanctions upon the defendants for their violation of the July 6, 1970 injunction - the proposed sanctions being the restoration to the OPF of the fees paid.

The matter was heard by Judge Bonsal on affidavits and oral argument. Judge Bonsal initially decided that Messrs. Karchmer and Segal should restore to the OPF the entire amount paid by the Fund to their attorneys (Appendix II, p. 79a). His basis for this was their negligence in "processing the lump sum payment to Perry."

The motion to impose sanctions of a similar nature on Curran, Wall and Freedman was denied.

Messrs. Karchmer and Segal then moved to reargue claiming that a portion of the services of their attorneys had

been rendered on behalf of the Fund itself as distinguished from services on behalf of the trustees personally and that that portion, which they estimate at 61% of the whole, had properly been paid from the Fund.

Judge Bonsal granted a reargument and without a hearing on the subject as required by City of Detroit v. Grinnell 495 F. 2d 448 (2nd Cir., 1974) accepted the suggested allocation of fees and made the order from which these appeals have been taken.

PLAINTIFFS' CONTENTIONS

The plaintiffs contend that:

1. The order of July 6, 1970 forbids the charging to the OPF of any part of fees of attorneys for the defendants.

2. The conduct of the trustees deprived them of any right to be indemnified from the trust for their attorneys' fees.

3. No rational allocation can possibly be made between services performed by attorneys for the trustees and services performed by them for the trust.

4. In any event the trust should be saddled with the expense of only one attorney not three, and a definitive determination can only be made after an evidentiary hearing.

ARGUMENT

POINT I

ALL OF THE FEES PAID TO DEFENDANTS' COUNSEL FROM THE OFFICERS' PENSION FUND SHOULD BE RESTORED TO THAT FUND

Each defendant was a union fiduciary under the provision of § 501. Each had been charged with a breach of his duties as such fiduciary. Each was personally in jeopardy of sanctions. Each was in need of counsel in his personal defense. The Officers' Pension Fund was also entitled to have and to pay counsel. However, the rights of the Fund as distinguished from the rights of the individual trustees were divergent. It was not possible for the same attorney to represent both. To attempt to do so would be utterly stultifying.

The Court in Yablonski v. UMW of America (C.A.D.C.) 454 F 2d 1036 at p. 1041 laid out precepts for guidance in just such a case. There as here union fiduciaries had been charged with dereliction of duties. There as here counsel paid with union funds had undertaken to represent the individual defendants. At page 1041 the Court said:

> "Where, as here, union officials are charged with breach of fiduciary duty, the organization is entitled to an evaluation and representation of its institutional interests by independent counsel, unincumbered by potentially conflicting obligations to any defendant officer."

At the same page:

> "*** in trying to achieve a valid definition of an institution's interest, it would seem that counsel charged with this responsibility should be as independent as possible."

At the same page:

> "*** counsel for UMWA should be diligent in analyzing objectively the true interest of UMWA as an institution without being hindered by allegiance to any individual concerned."

And at page 1042:

> "*** even if we assume *** at the present time that there is no visible conflict of interest, yet we cannot be sure that such will not arise in the future."

And at page 1039:

> "*** representation of a labor union by counsel free of possibly conflicting obligations to adverse parties is directly related to attainment of the goals Congress envisioned when it passed the Labor-Management Reporting and Disclosure Act of 1959."

THE ORDER OF JULY 6, 1970

The conflict which the Court envisaged in Yablonski existed here from the very beginning. The same principles as outlined in Yablonski prompted this Court on remand in this case to suggest that none of the defendants be allowed to be represented by counsel to be paid from union funds and the District Court to make the order dated July 6, 1970 enjoining them from doing so. (See Morrissey v. Curran, 423 F 2d 393,400.)

The defendants blithely ignored these principles, this Court's suggestion on remand and the order dated July 6, 1970. They did not do this innocently - that was hardly possible

at least after July 6, 1970 - but with their eyes wide open to the risks involved.

When Mr. Freedman, as one of the trustees of the OPF, received a second bill for services from his attorneys Messrs. Bloom and Epstein he requested his co-trustees Karchmer and Segal to approve payment from the OPF. Karchmer and Segal sought advice from their counsel on the subject. Strangely the counsel whose advice they sought was the same attorney (Simpson, Thacher & Bartlett) who then represented Segal in the action. These attorneys were in the same relative position with respect to the payment of their fees as was Bloom and Epstein. Simpson, Thacher & Bartlett also represented a defendant and (as now appears) had been paid and expected to be paid further from union funds. Notwithstanding this Karchmer and Segal were advised by counsel that, in view of Judge Bonsal's order, the second bill should not be paid at that time (December, 1972) but that the bill can be paid after (Freedman's) appeal is won. Karchmer and Segal reluctantly so advised Freedman by letter reading (Appendix II, p. 188a):

"December 21, 1972

"Dear Abe:

"In a discussion with Simpson Thacher & Bartlett, with respect to various matters relating to the captioned litigation, we talked about the bills from legal counsel. This brought us to the question of the recent bill from Bloom & Epstein. It was the opinion of our counsel that there was a legal question as to whether we can approve the Bloom & Epstein bill for payment in view of Judge Bonsal's decision. Counsel advised us that the bill can be paid after your appeal is won.

"We want to approve the Bloom & Epstein bill. However, in view of the court's general and

specific positions in this litigation and the need to avoid any possibility of our having to defend allegations based on the fact that we didn't seek independent legal advice and follow it, we have no alternative but to withhold approval of the Bloom & Epstein bill, at least for the present. Because there is a legal question as to the propriety of the Trustees approving this bill, we would be satisfied with a legal opinion from an independent attorney - like Judge Rifkin - advising the Trustees that the Bloom & Epstein bill can be approved for payment.

"As you can imagine, Abe, we are very troubled by the turn of events. However, we have no sensible alternative but to follow the advice of our legal counsel.

"With every good wish. Sincerely,

Martin E. Segal/Leon Karchmer"

Although Freedman's appeal was lost - not won - the bill was later paid.

This opinion also confirms that Karchmer's and Segal's attorneys knew that their right to be paid from the OPF was also stymied by the July 6, 1970 order. They too represented defendants charged with the misapplication of union funds. They too were in the dual position of trying to protect the fund as well as their individual clients. They too (as now appears) had been paid from union funds after July 6, 1970 and expected to be paid further from union funds.

If the defendants thought the order of July 6 was ambiguous in any respect, their remedy was to ask Judge Bonsal for an interpretation. They did not do this and their mistake, if indeed they were mistaken, is no excuse for a violation of that order.

Mr. Justice Douglas in McComb v. Jacksonville Paper Co., 336 U.S. 187 (1948) after holding that the absence of wilfulness does not relieve from civil contempt, said at p. 192:

> "***Yet if there were extenuating circumstances or if the decree was too burdensome in operation, there was a method of relief apart from an appeal. Respondents could have petitioned the District Court for a modification, clarification or construction of the order. See Regal Knitwear Co. v. Labor Board, 324 U.S. 9,15. But respondents did not take that course either. They undertook to make their own determination of what the decree meant. They knew they acted at their peril."

ON GENERAL EQUITABLE PRINCIPLES

But even if the order of July 6, 1970 had never been made the result would be the same. The application of the principles spelt out in Yablonski, alone produce the same result.

An attorney who undertakes to represent conflicting interest should expect no consideration from the Court when applying for an allowance or for the confirmation of a payment made in defiance of such principles. In fact the July 6, 1970 order simply directed a course which the parties should have taken without that order.

For instance the same attorney should not be allowed to represent both the corporation in a stockholder derivative suit and the defendant directors of the corporation (Lewis v. Shaffer Stores (S.D.N.Y. 1963) 218 F. Supp 238. And still more relevant the attorneys representing defendant trustees should not be allowed to look to the protected fund for their fees (International Brotherhood of Teamsters v. Hoffa [D.C.D.C. 1965] 242 F. Supp 246, 256; Tucker v. Shaw [E.D.N.Y. 1966] 269 F. Supp 924, 927-928).

As Brieant, J. said recently in Cinema 5, Ltd. v. Cinerama Inc. (D.C.N.Y. 1975) 74 Civ. 3549 (not reported):

> "*** disqualification is required to avoid even the appearance of professional impropriety."

quoting from this Court in General Motors v. City of New York (CA 2) 501 F. 2d 639.

POINT II

FREEDMAN'S BEHAVIOR STANDING ALONE HAS DENIED HIS COUNSEL ANY RIGHT TO ALLOWANCES FROM THE FUND

Freedman was guilty of wilful misconduct. He had

shown a callous indifference to his duties as trustee of the fund and yet his counsel billed and was paid by the fund sums aggregating $85,397.31. After the "Dear Abe," letter of December 21, 1972 (see supra p. 11) and after Freedman had lost his appeal, notwithstanding such loss the trustees requested the Willkie firm to advise them if any part of the Bloom and Epstein bill to Freedman could be paid from the OPF. In requesting this opinion the trustees failed (or so it would appear from the Willkie opinion) to advise the Willkie firm of the standing order of July 6, 1970 and failed to advise the Willkie firm that $51,371.58 had already been paid to Bloom and Epstein on account of bills rendered Freedman. The Willkie firm gave its opinion on the assumption that the entire Bloom and Epstein fee was the $56,709.56 then under consideration.

Of course, on the basis of these misinformations the Willkie opinion becomes valueless. One wonders why this opinion was sought at all. The trustees had already been advised by Simpson Thacher and Bartlett that no part of the Bloom and Epstein bill should be paid from the fund "until Freedman had won his appeal." Were they shopping for a favorable opinion?*

At any rate the opinion was sought and the Fund paid $7,069.84 for it. Clearly this work was for Freedman's benefit and he - not the trust fund - should be saddled with the expense.

In this opinion (Appendix II, p. 178a) the Willkie firm labored to compare instances where an attorney who represented

*"There are many persons who will go from lawyer to lawyer with a case, until they find one who is willing to express an opinion which tallies with their own." Shalswood, Professional Ethics, p. 108.

a defaulting trustee was allowed a fee for services rendered to the trust in a matter unrelated to the trustees default. But that is not the case here. Here the default related to the payment of lump sum pensions to persons who were not officers of the union. The remaining issues related to the right of the OPF to receive contributions from the union for pensions of persons who were not union officers. These issues are not unrelated. They each dealt with the right of non-officers to participate. That some of the remaining issues dealt with the question of who were and who were not union officers is beside the point. If Freedman could have prevailed on his claim that the OPF covered all personnel as well as officers the claim against Perry would have fallen with the rest. The Willkie comparison was thus misplaced.

Incidentally, it is passing strange that while Bloom and Epstein appeared for Curran and Wall as well as for Freedman it does not appear that Bloom and Epstein have allocated any part of their fee to the defense of these two gentlemen. The entire bill of Bloom and Epstein was paid by OPF and by Freedman in the proportions worked out by the Willkie firm. Curran and Wall got a "free ride" notwithstanding the order of July 6, 1970. That order had enjoined them from retaining counsel to be paid from union funds. But they simply disregarded it.

But Freedman's refusal to credit the order of July 6, 1970 was not limited to the payment to Bloom and Epstein by OPF. After the judgment of November 15, 1972, he (and his firm) moved the District Court for permission to again take up the gauntlet

as attorneys on the appeal from that judgment. That motion was denied on January 15, 1973.

Yet, thereafter, when this Court affirmed the said judgment against Mr. Freedman, paying no heed to the July 6 order, he engaged his law partners Marvin I. Barish and Wilfred R. Lorry to petition the Supreme Court of the United States for a writ of certiorari on his behalf (Appendix II, p. 25-26a). Quite obviously Mr. Freedman's partners were no different from Freedman himself, were sharing in the retainer paid him by NMU and were counsel paid with union funds.

Thereafter, in the proceeding below Mr. Freedman, still paying no heed to the July 6 order, again used his partners Messrs. Gruber and Sovel to represent him personally against his retainer, NMU.

Mr. Freedman and members of his firm labored under an additional conflict* which not only endangered their fidelity to NMU but also made it impossible for them to give their exclusive and undivided devotion to the cause of NMU.

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*"Canon 5 A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client
Ethical Considerations
EC 5-1 The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.
Interests of a Lawyer That May Affect His Judgment
EC 5-2 A lawyer should not accept proffered employment if his personal interests or desires will, or there is reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client. After accepting employment, a lawyer carefully should refrain from acquiring a property right or assuming a position that would tend to make his judgment less protective of the interests of his client." The Lawyer's Code of Professional Responsibility, As Approved by the American Bar Association and Adopted by the New York State Bar Association, Effective January 1, 1970, p.30.

POINT III

THE EXPENSE OF VAIN EFFORTS TO COLLECT THE PERRY JUDGMENT WAS ALSO CHARGEABLE TO FREEDMAN

The judgment against Freedman represented money which he had transferred to Perry in violation of his duties as a trustee. The judgment against Perry represented the same money. The OPF could not retain the proceeds of both the Freedman judgment and the Perry judgment. The collection of the Perry judgment would have satisfied the judgment against Freedman. The collection of the Freedman judgment would have subrogated Freedman as Perry's judgment creditor in the place and stead of OPF. It follows that once the OPF had judgments against both Freedman and Perry it was Freedman's responsibility. Freedman had the burden of trying to collect the judgment against Perry. After all, Freedman's indifference to his duties as trustee had caused the loss. In equity he, not the trust, should bear the salvage cost. Every penny collected on the Perry judgment would have benefited Freedman - not the trust.

One wonders why it was deemed necessary by the trustees to incur the expenses totaling over $29,000, of conducting simple sup pro proceedings. Why couldn't Mr. Freedman have

"pulled his own chestnuts from the fire"?* Failing that he should bear the expense of pulling them out. Sup pro proceedings required no particular expertise.

POINT IV

BY THEIR NEGLIGENCE KARCHMER AND SEGAL FORFEITED THEIR RIGHT TO CHARGE ANY PART OF THEIR EXPENSE TO THE TRUST

Judge Bonsal had found both Karchmer and Segal guilty of negligence. In effect he confirmed this finding by

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* But Perry's affidavit (Appendix II, p. 124-125a) bears witness to the outrageous behavior of Mr. Freedman - and how he went so far as to make cash payments to the lawyers for a party in opposition to his union and his trust totaling $5,250.00. (See also Appendix II, p. 138-145a.) In addition, the suggestion that the remainder of Mr. Perry's legal expenses be paid in a most devious and unusual way by NMU has never been denied by Mr. Freedman. That suggestion was that Mr. Litke, the lawyer then representing Perry in this case, settle an unrelated claim for the sum of $65,000.00 - "and that would include an amount which was more than enough to cover Litke's fees" for Perry in this case. Hasbrouck v. Rymkeviteh (3rd Dept. 1966) teaches that the personal righteousness or subjective good faith of the fiduciary, agent or attorney is completely immaterial when it develops that he has aligned himself with an opposing interest. That is what Mr. Freedman did in this case from beginning to end.

making the order now on appeal. His finding was based on substantial and convincing evidence. Karchmer and Segal had been led to favor the Perry payment by their misplaced loyalty to Curran or their fear of his wrath (Appendix I, p. 1224a). Their conduct indicates that they were well aware of the questionable nature of the payment. Wherein consider the photostat of the $41,250.01 check (Appendix I, p. 1215a); the unusual and unprecedented nature of the transaction (Appendix I, p. 1217a); the aura of haste pervading the transaction (Appendix I, p. 1217-1218a); the postdating of the check (Appendix I, p. 1217a); their willingness, even eagerness, to do Curran's bidding. The finding of negligence was inescapable.

But they escaped a surcharge because they had the convenient advice of counsel. This, as Judge Bonsal found, brought their misconduct within the ambit of the exculpatory clause.

Now Messrs. Karchmer and Segal are attempting to use the exculpatory clause not only to avoid a surcharge but also to justify charging their trust fund with the expense of litigation which their negligence had fostered. The first

is in accord with the strict letter of the trust instrument. The second depends upon the application of principles of equity. Judge Bonsal recognized the difference. While he did not find "wilful misconduct" he did find that their conduct had deprived them of the right to invoke the equitable rule of indemnity. During rehearing he said (stenographic minutes of June 28, 1974, smp. 3):

> "THE COURT: I think there has been a misunderstanding there. I am not charging these trustees with wilful misconduct. I am stating that although they are not surcharged, as I said in the opinion, I think they were pretty damned sloppy in the way they handled this thing, and that I see no basis for the pension fund paying their legal fees."

In refusing them indemnification he was supported by authority. In adjudging the defendants liable for the amounts paid to their attorneys out of union funds District Judge Body said in Highway Truck Drivers and Helpers Local 107 v. Cohen, 215 F. Supp. 930 (E.D., Pa., 1963), aff'd 334 F. 2d 378 (3rd Cir., 1964), cert. denied, 379 U.S. 921 (1964) at page 941:

> "We do not decide whether defendants may or can be exonerated, or whether exoneration authorizes the union to indemnify them.*** Defendants should not be allowed to use union funds to assist them in their defense."

In Matter of Estricher (Surrogate's Court, New York County, 1952), 202 Misc. 431, the learned Surrogate Frankenthaler held that a trustee was not entitled to reimbursement of its disbursements (attorneys' fees) incurred in resisting an application to remove it when it has been "remiss in the performance of

certain of its trust duties." Surrogate Frankenthaler observed that the criterion in such a case was not whether the fiduciary succeeded (in avoiding removal) and expressly said at pages 434-435:

> "This court did not consider the charges against the petitioning trustee to be unfounded nor the proceeding for its removal unjustified. The court denied the application to revoke the letters of trusteeship only because it deemed removal not to be to the best advantage of the estate despite the justified criticism of the trustee's conduct. The denial of the application for removal was neither an exoneration of the trustee nor an implicit finding that the opposition to the application was in the interest of the estate. To the contrary the court considers the opposition of the trustee to have been solely in its personal interest."

Scott on Trusts, Volume 3, § 245, p. 2155 states:

> "*** if the trustee negligently permitted a third person to obtain possession of the trust property, the expenses of the litigation which resulted must be borne by the trustee personally." (Emphasis added.)

In fact their reliance upon advice of counsel is a slim reed even to support the non-wilful finding. For, upon what counsel did they rely? They relied upon counsel who had

represented Perry, who was a pawn in Curran's hand, and who gave his advice over the telephone from Philadelphia (Appendix I, p. 1209p) and under the most hurried circumstances. If Messrs. Karchmer and Segal were honest in their seeking counsel, if they were seeking counsel in good faith, why did they go to their fellow trustee, Freedman. They must have known what his advice would be before asking it. They obviously wanted counsel who favored Perry. Later, when they needed advice on the payment of Freedman's counsel from the fund, they took the precaution of asking the Willkie firm for an opinion. (Even then it would have been more appropriate if they had asked Judge Bonsal to pass on the matter before payment.) Still later when attempting to collect the Perry judgment they were not content to leave the sup pro proceedings in the hands of Freedman's office. They employed Judge Botein. Yet they now insist that their reliance upon Freedman's opinion on the initial payment to Perry evidences their good faith!

POINT V

THERE IS NO BASIS, ON THE RECORD, FOR THE 39-61% ALLOCATION

At first Judge Bonsal directed that the entire fees

of counsel for Karchmer and Segal be refunded to the OPF. Upon reargument Judge Bonsal requested counsel to break their charges down between services performed on the Perry problem and services performed on issues unrelated to Perry. Affidavits were submitted (Appendix II, p. 126a, et seq, and p. 95a, et seq) in which the attorneys conceded that this could not be done. (See discussion, supra, on this same subject at Point I of this brief.) In lieu of such a statement they suggested that the fees be allocated between the issues on the basis of the amount of dollars involved in each. This worked out to a 39-61% allocation. And Judge Bonsal so ordered. No plenary hearing was held to determine what part, if any, could be properly charged to the fund.

POINT VI

THE DEFENDANTS SHOULD NOT BE ALLOWED TO CHARGE OPF WITH THE FEES OF THREE SEPARATE SETS OF ATTORNEYS

Trustees of a fund must be reasonably careful to minimize the expenses incurred on behalf of the trust. In other words they must not waste the fund. That is axiomatic.

Here Freedman, one trustee, engaged Messrs. Bloom and Epstein.* Segal, another trustee, engaged Messrs. Simpson, Thacher and Bartlett, and Karchmer, the third trustee, engaged at first Messrs. Simpson,Thacher and Bartlett and later Mr. Herman E. Cooper. In support of their claim of right to charge the fees of these three counsel to the fund, they insist that each retained counsel to defend the trust from the plaintiffs' claim made in the complaint. In other words each firm was retained to do the same identical work. And each firm claims that it did the same work and each takes credit for whatever benefit the Fund derived from such services.

The Bloom and Epstein firm has been paid $85,829.11 (of union funds) as the value of their services in defending the trust against the plaintiffs claim (Appendix I, p. 110a).

The Simpson firm has been paid $101,652.69, as the value of their services in defending the trust against the plaintiffs' claim (Appendix I, p. 110a).

Mr. Cooper has been paid $65,991.76 as the value of his services in defending the trust against the plaintiffs' claim (Appendix I, p. 110a).

In addition, Simpson, Thacher and Bartlett and Herman Cooper have accrued, but not billed, charges in excess of $19,500.00 (Appendix I, p. 110a).

No reason exists why any one of these attorneys should not have done an adequate job. The fact that different attorneys

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*After he was forced to bow out.

had been retained to represent each trustee forcibly points up the fact that their interests were adverse not only in their relationship to the trust but also in their relationship to one another. To saddle the Fund with the fees of all three sets of attorneys would be a pure waste.

POINT VII

UNDER THE RULE IN CITY OF DETROIT V. GRINNELL A PLENARY HEARING SHOULD HAVE BEEN HELD ON THE SUBJECT OF ALL FEES

In City of Detroit v. Grinnell (2nd Cir, 1974) 495 F. 2d 448 this Court (Moore, C.J.) said at p. 473:

> "There is no doubt that in a case such as this, where there were many vigorous disputes of fact over the elements that comprised the fee award, an evidentiary hearing, complete with cross-examination, is imperative."

The application of this rule required the District to conduct a plenary hearing on the issues of:

1. A proper allowance, if any, from the OPF for counsel representing Freedman - and for services rendered in his behalf;

2. A proper allowance, if any, from OPF for counsel representing Karchmer;

3. A proper allowance, if any, from OPF for counsel representing Segal;

4. A determination of whether or not any part of the fee paid by the union to the Rifkind firm was on account of the services rendered on the Freedman appeal (Appendix II, p. 145a and 211a); and

5. A determination of what part, if any, of the Bloom and Epstein bill should be paid by Curran and Wall personally.

The time has passed, in this circuit at least, when fees of counsel, to be paid from a fund in Court or subject to the Court's order can be determined on affidavits alone.

The questions at such plenary hearing should involve not only the quantum of fees but also and more importantly the issue of the allocation of the Bloom and Epstein fee between the OPF and Freedman and Curran and Wall; the issue of whether or not it was proper to charge OPF with the entire cost of the sup pro conducted for Freedman's benefit; the issue of allocation of the Simpson, Thacher and Bartlett fee between the OPF and Segal, and Karchmer and Segal; the issue of the allocation of the Cooper fee between the OPF and Karchmer; the production of documents and related testimony on the payment of union funds to the Rifkind firm subsequent to the Freedman appeal; and finally the issue of the waste of OPF money in hiring three sets of expensive attorneys all to conduct the trial of the same matter.

CONCLUSION

The order appealed from should be modified so as to direct that:

1. The entire fee paid to Freedman's counsel be restored to the OPF.

2. Freedman restore to OPF the fees paid to the Wilkie firm and to the Botein firm.

3. The entire fee paid to attorneys for Karchmer and Segal be restored to OPF.

or

In the alternative, the District Court be directed to conduct a plenary hearing to determine where the burden of such fees should rest.

Respectfully submitted,

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Of Counsel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAMES M. MORRISSEY, JOSEPH PADILLA, RALPH IBRAHIM, individually and on behalf of the members of the National Maritime Union of America,

Plaintiffs-Appellees-Appellants,

against

JOSEPH CURRAN, SHANNON WALL, WILLIAM PERRY, ABRAHAM E. FREEDMAN, MARTIN SEGAL and LEON KARCHMER,

Defendants-Appellants-Appellees.

AFFIDAVIT OF SERVICE BY MAIL

ON APPEAL FROM UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Rose Rinella, being duly sworn, deposes and says that she is over the age of 18 years, is not a party to the action, and resides at 951 E. 17th Street, Brooklyn, New York, 11230
That on March 7, 1975, she served 3 copies of Brief of Plaintiffs-Appellees-Appellants
on

SIMPSON, THACHER & BARTLETT, ESQS.
ONE BATTERY PARK PLAZA
NEW YORK, NEW YORK.

CHARLES SOVEL, ESQ.,
346 WEST 17th STREET,
NEW YORK, NEW YORK.

HERMAN E. COOPER, ESQ.,
500 FIFTH AVENUE
NEW YORK, NEW YORK.

BROMSEN, GAMMERMAN ALTIER & WAYNE, ESQS.,
450 SEVENTH AVENUE,
NEW YORK, NEW YORK.

ABRAHAM E. FREEDMAN, ESQ.
346 WEST 17th STREET,
NEW YORK, NEW YORK.

by depositing the same, properly enclosed in a securely-sealed, post-paid wrapper, in a Branch Post Office regularly maintained by the United States Government at 350 Canal Street, Borough of Manhattan, City of New York, addressed as above shown.

Rose Rinella

Sworn to before me this
7th day of March, 1975

John V. Esposito

JOHN V. ESPOSITO
Notary Public, State of New York
No. 30-0982330
Qualified in Nassau County
Commission Expires March 30, 1975